

**STATE OF VERMONT**  
Natural Resources Board  
District Environmental Commission #1  
440 Asa Bloomer State Office Building  
Rutland, VT 05701-5903  
(802)786-5920  
August 4, 2008

Jon Anderson  
David W. Rugh  
Burak Anderson & Melloni, PLC  
30 Main Street  
P.O. Box 787  
Burlington, VT 05402-0787

**Subject: Jurisdictional Opinion #09-065, Peter and Delores Norris  
Nursery/Horticultural/Greenhouse/Landscaping Operations, East  
Side of Route 7, New Haven, Vermont**

Dear Mssrs. Anderson and Rugh:

I write in response to your letter request dated June 3, 2008 for an opinion on whether or not the subject activities require an Act 250 permit. Pursuant to 10 V.S.A. § 6007, you have requested a formal opinion with distribution. I note for the record that the District 9 Act 250 Commission and coordinator are recused from proceedings related to the Norris operations. The requested opinion is provided below.

**I. Summary of Opinion**

For reasons outlined below, it is my opinion that jurisdiction is not currently triggered under 10 V.S.A. § 6001 et seq. (Act 250) for the activities recited in your letter and summarized in the subject line above.

**II. Facts and Documents**

In forming this opinion, I rely upon the accuracy of the following facts, representations, and/or documents.

1. The facts as recited in your letter to me dated June 3, 2008. In summary, that letter recites a history of nursery, horticultural, greenhouse and landscaping operations conducted on the site over the past 15-20 years. For the sake of brevity, those facts will not be repeated here. A copy of the letter is appended to this opinion in Appendix A.
2. Your supplemental letter to me dated June 30, 2008 containing a service list of adjoining property owners or others to whom you request that formal notice of this opinion be served.
3. A site visit conducted on August 1, 2008.

### **III. Analysis**

The Act 250 jurisdictional status of the subject activities is governed by statute and by Act 250 Rule - namely:

- a. 10 V.S.A. § 6001(3) ("the word 'development' shall not include construction for farming, logging or forestry purposes below the elevation of 2500 feet"). Construction of improvements for "farming" purposes is exempt from Act 250 jurisdiction.
- b. 10 V.S.A. § 6001 (22): "Farming" is defined to include the growing of horticultural crops and the "operation of greenhouses." 10 V.S.A. § 6001(22)(A), (c). "Farming" also includes "the on-site storage, preparation and sale of agricultural products principally produced on the farm." 10 V.S.A. § 6001(22)©).
- c. Act 250 Rule 2(c)(19) defines the phrase "principally produced" to mean that more than 50% of the agricultural products resulting from farming activities on the property are sold, stored, grown, or produced on the farm.

In this case, and based upon the facts and analysis contained in Appendix A, I conclude that the majority of the products sold by the Norrises' nursery, greenhouse and landscaping business are produced on the Norris farm itself. Accordingly, the subject activities are entitled to the statutory exemption from Act 250 jurisdiction as their activities satisfy the definition of "farming" under both statute and rule.

My opinion of no jurisdiction is contingent upon the accuracy of the facts as recounted in Appendix A. While the subject activities are exempt from Act 250 jurisdiction, the requestors and their successors and assigns are reminded that this opinion does not exempt the subject activities from such other state or local permits which may be

required. Moreover, in the event that the operation is proposed to be materially changed in the future, I would be obligated to revisit this opinion.

#### **IV. Conclusion**

The subject facilities and activities do not trigger jurisdiction, and do not require a Land Use Permit under Act 250. Substantial changes to the operations described herein should be referred to my office for a jurisdictional review.

#### **V. Reconsideration or Appeal**

Persons who qualify as parties pursuant to 10 V.S.A. § 6085(c)(1)(A) through (E) may request reconsideration from the coordinator within 30 days of the mailing of the opinion pursuant to Act 250 Rule 3(c). The opinion may be appealed to the Environmental Court within 30 days pursuant to 10 V.S.A. § 8504(a).

Sincerely,

/s/ William T. Burke  
William T. Burke  
Acting District #9 Coordinator

c: Certificate of Service

## **APPENDIX A**

June 3, 2008

Mr. William Burke, Coordinator  
District 1 Environmental Commission  
440 Asa Bloomer Office Building  
Rutland, VT 05701-5903

Re: Opinion of no jurisdiction over the farming and horticultural activities of Peter and Dolores Norris in New Haven, Vermont

Dear Mr. Burke:

On behalf of Peter M. and Dolores M. Norris, we seek a jurisdictional opinion that the activities conducted on the Norrises' property on U.S. Route 7 in New Haven, Vermont, southerly of Route 7's intersection with Hunt Road, are not "development" as defined by 10 V.S.A. § 6001 and associated Act 250 Rules. The Norrises purchased a 10.1-acre property in 1990 and shortly thereafter, in 1992, began a small seasonal<sup>1</sup> nursery and greenhouse business selling annuals, perennials, shrubs and some trees, the majority of which were grown and sold on the property.<sup>2</sup>

The Norrises' seasonal nursery and greenhouse business has expanded substantially since 1992. The operation now includes eight greenhouses, where annuals, perennials, shrubs and some trees continue to be sold. Throughout the history of the nursery and greenhouse business, a majority of the horticultural products for sale have been grown on the property.

The Norrises' nursery also includes a landscaping service that installs and plants off-site the flowers, shrubs, and trees that are grown on the property. The landscaping aspect of the operation enables the Norrises to increase greenhouse sales by providing outstanding service to their customers. The Norrises derive 30% or less of their annual revenue from purely landscaping-related activities, which excludes the sale of horticultural products grown on site that are delivered to customers. The landscaping aspects of the operation occur off site at nearby homes and businesses, but some vehicles and equipment relating to the landscaping operation, are stored on the property including two skidsteers, four trucks and some landscaping equipment. During the peak months from April to August, the Norrises employ twenty full- and part-time

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<sup>1</sup> The operation runs roughly from April 15 through October 31 annually.

<sup>2</sup> The elevation of the Norrises' property is below 2,500 feet.

employees. On average, there are only five employees working on landscaping. Landscaping employees report to and end work at the greenhouse. They use planting supplies commonly used by, and kept at, the greenhouse.

In 2001, the Norrises subdivided a 2.5-acre parcel from their 10.1-acre farm and sold such parcel to their son in October 2002. This subdivision resulted in their nursery operations being conducted on a 7.6-acre parcel as of the date of the subdivision.

It is believed that the Norrises' nursery and landscaping operations conducted on the farm are exempt from the definition of "development" contained in 10 V.S.A. § 6001. Section 6001(3)(D) provides that the construction of improvements for farming below 2,500 feet in elevation is not included in the definition of "development". "Farming" is defined to include the growing of horticultural crops and the "operation of greenhouses." 10 V.S.A. § 6001(22)(A),(c). "Farming" also includes "the on-site storage, preparation and sale of agricultural products principally produced on the farm." *Id.* § 6001(22)(c). The Environmental Board concluded that the definition of "farming" is plain on its face and unambiguous and should be enforced according to its terms. *Re: Richard and Marion D. Josselyn*, Decl. Ruling # 333, Findings of Fact, Conclusions of Law and Order (Feb. 28, 1997), at 5; *Re: Vermont Egg Farms, Inc.*, Decl. Ruling #317, Findings of Fact, Conclusions of Law and Order (June 14, 1996), at 6.

In accordance with Act 250's definition of farming, the on-site sale of horticultural farm products, such as the annuals, perennials, trees and shrubs, and the Norrises' operation of greenhouses are exempt from the definition of "development." 10 V.S.A. § 6001(22)(E). Furthermore, Act 250 Rule 2©)(19) defines the phrase "principally produced" to mean that more than 50% of the agricultural products resulting from farming activities on the property are sold, stored, grown, or produced on the farm. As the majority of the products sold by the Norrises' nursery, greenhouse and landscaping business are produced on the Norris farm itself and as their activities satisfy the definition of "farming," the Norrises' operation is exempt from Act 250 jurisdiction.

This result is in line with three principal decisions of the former Environmental Board construing Act 250's farming exemption. In *Vermont Egg Farms, Inc.*, the Board concluded that despite the large size of the proposed poultry and egg farm, the operations conducted on the property constituted farming and were therefore exempt from needing to obtain a land use permit. *Vermont Egg Farms, Inc.*, at 6. The Board reached this conclusion even though a significant portion of the manure generated by the farm was trucked off-site as fertilizer for other nearby farms—a similar incidental service component of the farm operation to the Norrises' off-site landscaping.

In *Josselyn*, the Board considered whether a proposed greenhouse and florist operation that sold horticultural products produced on the premises satisfied the farming exemption. The Josselyns proposed growing flowers and other plants under lights in their garage in addition to the sale of plants grown on the property, and the Board concluded that the exemption was satisfied. *Josselyn*, at 6. Interestingly for the purposes of considering the Norrises' off-site landscaping operation, in *Josselyn* the

Board found that “Although [the Josselyns] intend to sell some books, cut flowers and gift items not produced at their Ludlow property, these items will be ancillary to the sale of horticultural products produced on the premises.” *Id.*

Finally, in *Scott Farm, Inc.*, the Board recently found that an on-site culinary school devoted to cooking and marketing products produced on the Scott Farm satisfied Act 250’s farming exemption. *Re: Scott Farm, Inc.*, Decl. Ruling #413, Findings of Fact, Conclusions of Law, and Order (Jan. 16, 2003), at 10. Although the Board considered the non-traditional nature of the activities on the farm, it found that the culinary school’s students would be “principally engaged in activities which fall within the exemptions listed in 10 V.S.A. § 6001(22),” including the “on-site storage, preparation and sale of agricultural products principally produced on the farm.” *Id.* The Board focused on the “limited” and “narrow” nature of the Scott Farm project, stressing that it involved only the preparation and sale of Scott Farm’s agricultural products and would not expand into other activities normally associated with a culinary school. *Id.* Thus, like the Norrises’ landscaping operation, the purpose of the culinary school was to provide a market for the farm’s agricultural products. *Id.*

While we have reached the conclusion that the Norrises’ activities are exempt, your input as to whether Act 250 jurisdiction attaches to the Norrises’ seasonal nursery, landscaping and greenhouse operation would be greatly appreciated. The Norrises ask that a formal jurisdictional opinion be issued and will pay the costs of any public notice that may be required in conjunction with the issuance of such formal jurisdictional opinion. In the event that you find jurisdiction over the Norrises’ ancillary landscaping operation, such jurisdiction should be limited to only the land area involved in such activities pursuant to 10 V.S.A. § 6001(3)(E). Moreover, if you would like any additional information or have any questions, please do not hesitate to contact us.

Very truly yours,

Jon Anderson  
David W. Rugh

JTA/DWR/alb

bc: Mr. Peter Norris

